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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

ALABAMA ELECTRIC COOPERATIVE, INC., *Petitioner*

v.

SECURITIES AND EXCHANGE COMMISSION,
ALABAMA POWER COMPANY and
THE SOUTHERN COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Alabama Electric Cooperative, Inc. (hereinafter called the Cooperative), respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, which affirmed an order of the Securities and Exchange Commission denying the Cooperative's petition to intervene and denying the Cooperative a hearing in a financing proceeding under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 et seq.

OPINIONS BELOW

The opinion and order of the Securities and Exchange Commission are not yet reported; they are set forth at pages JA 113-124 of the Joint Appendix duplicated for use in the Court of Appeals (R. 113-124).[1] The opinion of the Court of Appeals likewise is not yet reported; it is set forth in Appendix A to this petition (pp. 1a-5a, infra).

JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. §§ 1254(1) and 2101(c), and on Section 24 of the Holding Company Act, 15 U.S.C. § 79x. The Court of Appeals rendered its opinion and judgment November 24, 1965 (R. 129, 135). This petition is being filed within ninety days thereafter.

QUESTIONS PRESENTED

1. Whether, in this Holding Company Act financing proceeding, the Securities and Exchange Commission should have afforded Alabama Electric Cooperative an opportunity to show at a hearing that, under the Holding Company Act's standards, the circumstances, as alleged by the Cooperative, called for SEC to impose reasonable and appropriate conditions on Alabama Power Company's proposed issue and sale of common stock and on The Southern Company's proposed acquisition thereof—such conditions being for the purpose of assuring that Alabama Power Company would not use the proceeds for projects involving wasteful or unnecessary duplication of facilities already installed

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[1] Pursuant to this Court's Rule 21(3) and (4), nine additional copies of the Joint Appendix are being filed in this Court. The record as certified by the Clerk of the Court of Appeals is referred to herein as "R."

by the Cooperative and its member systems, or for measures otherwise detrimental to the public interest or the interest of investors and consumers. Or whether instead (as SEC determined), despite the broad standards established by the Holding Company Act for SEC's responsibilities to protect the public interest and the interest of investors or consumers, such matters are to be considered not by SEC but exclusively by the Alabama Public Service Commission, and this without regard to, and without SEC inquiry into, the adequacy or effectiveness of Alabama's regulatory measures.

2. Whether SEC should have granted the Cooperative's petition to intervene and for a hearing on the issues raised by the Cooperative's petition; and whether SEC's failure to do so contravened either the Holding Company Act or the Administrative Procedure Act or both.

STATEMENT OF THE CASE

This case involves an important question under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 et seq.

On January 22, 1965, there was filed with the Securities and Exchange Commission a joint application-declaration by The Southern Company (which is a registered holding company) and by various of its subsidiaries including Alabama Power Company. Among other things, the joint application-declaration proposed that The Southern Company be authorized to use $14,000,000 for purchasing an additional 140,000 shares of common stock of Alabama Power Company, and that Alabama Power Company be authorized to issue and sell such shares to The Southern Company, such proceeds to be applied by Alabama Power Company

towards Alabama Power Company's 1965 construction program (J.A. 1-16). Within the time fixed by a notice issued by SEC (J.A. 31-33), Alabama Electric Cooperative, Inc. (herein called the Cooperative) filed with SEC a petition requesting that a hearing be held on the issues raised by the joint application-declaration, and to intervene as a party and to participate and be heard in the proceeding (J.A. 34-44).

Its petition filed with SEC showed that the Cooperative is a non-profit electric corporation organized as a cooperative under the laws of Alabama and engaged in generating and transmitting electric energy to various of its members. Those members receiving electric energy from the Cooperative consist of certain distribution cooperatives (which, like the Cooperative itself, are financed by loans from the Rural Electrification Administration), certain Alabama municipalities, and two industrial corporations. The Cooperative's petition included the following (J.A. 40-41):

> "9. It is the Cooperative's position that during recent years Alabama Power Company has been and now is pursuing a course of conduct which involves wasteful, unnecessary and unjustified duplication of lines and facilities already installed by and being used by the Cooperative and its member systems for furnishing electric energy to their customers, and involves an effort by Alabama Power Company to take away from the Cooperative and its member systems valuable customers already receiving adequate electric service; that such duplication of lines and facilities by Alabama Power Company has caused and will cause the idling of electric lines and facilities in which the Cooperative and its member systems have a large investment; that such duplication of lines and facilities by Alabama Power Company will adversely affect the economic condition of the areas concerned; and

> that such duplication by Alabama Power Company is detrimental to the public interest and to the interest of investors and consumers. On these matters the Cooperative stands ready to adduce evidence before this Commission when a hearing is scheduled in this proceeding. In addition, it is the position of the Cooperative that such wasteful, unnecessary and unjustified duplication by Alabama Power Company imposes permanent burdens on the consumer by putting into Alabama Power Company's rate base the additional costs of lines and facilities which are wholly unnecessary and need not be built; and that the ultimate sufferers will be not only the Cooperative and its members, but the consumers and the public at large in the areas served."

The petition shows that the Cooperative requested a hearing at which it would be given an opportunity to show why, in the light of such allegations and under the standards established by the Holding Company Act, the circumstances called for SEC to impose reasonable and appropriate conditions on Alabama Power Company's proposed issuance and sale, and on The Southern Company's proposed acquisition, of Alabama Power Company stock. The purpose of the conditions requested was to assure that none of the proceeds of the financing be used by Alabama Power Company for projects involving wasteful or unnecessary duplication of facilities or for measures otherwise detrimental to the public interest or the interests of investors and consumers.

Specific issues which the Cooperative's petition raised under the Holding Company Act included the following (J.A. 39-40):

> (a) Whether, in the event SEC granted an exemption from Section 6(a) of the Holding Company Act, 15 U.S.C. § 79f(a),—an exemption which the joint application-declaration claimed

by virtue of the provisions of the third sentence of Section 6(b), 15 U.S.C. § 79f(b)—then SEC should at the same time impose conditions "appropriate in the public interest or for the protection of investors or consumers," as also contemplated by Section 6(b).[2]

(b) Whether, in the event that appropriate conditions were not imposed, the acquisitions by Southern would tend towards the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers (within the meaning of Section 10(b)(1) of the Holding Company Act, 15 U.S.C. § 79j(b)(1)).

(c) Whether, in the event that appropriate conditions were not imposed, the acquisitions by Southern would be detrimental to the public interest or the interest of investors or consumers (within the meaning of Section 10(b)(3) of the Holding Company Act, 15 U.S.C. § 79j(b)(3)).

(d) Whether, in the event that appropriate conditions were not imposed, there would be lacking a basis for finding that the acquisitions by Southern would serve the public interest by tending towards the economical and efficient development of an integrated public-utility system (within the meaning of Section 10(c)(2) of the Holding Company Act, 15 U.S.C. § 79j(c)(2)).

(e) Whether appropriate terms and conditions should be imposed, as necessary or appropri-

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[2] The text of Sections 6(a) and 6(b) of the Holding Company Act, and of other pertinent provisions referred to, is set forth in Appendix B (pp. 6a-14a, infra).

ate in the public interest or for the protection of investors or consumers, as contemplated by Section 10(e) of the Holding Company Act, 15 U.S.C. § 79j(e).

The Cooperative's petition also noted that the subject of Alabama Power Company's unnecessary duplication of lines and facilities had been before the Alabama Public Service Commission and the Alabama state courts in connection with requisite state regulatory approvals of Alabama Power Company's financing proceedings in recent years, and that an anti-duplication clause had been inserted in the approvals granted by the Alabama Public Service Commission for the 1963 and 1964 financing proceedings. The petition noted, however, that in the 1965-1966 financing proceeding, which included Alabama Power Company's application for the requisite state regulatory approval of the proposed stock issuance involved before SEC in the present proceeding, the Alabama Public Service Commission had omitted the anti-duplication provision by two-to-one vote, and that such order was then pending on review in the Circuit Court of Montgomery County, Alabama.[3] The petition went on to say that, whatever the scope of the issues which might have been involved in the state proceedings, it seemed clear that SEC had the responsibility for examining whether, in the present proceeding, appropriate conditions should be imposed in the light of the standards set forth in the Holding Company Act (J.A. 37-38, footnote 3).

On June 1, 1965, SEC issued an order permitting the joint application-declaration to become effective; it

[3] The case is still pending in the Circuit Court of Montgomery County, No. 36477, *Alabama Electric Cooperative* v. *Alabama Public Service Commission.*

denied the Cooperative's petition for leave to intervene and denied the Cooperative's request for a hearing (J.A. 123-124). In the accompanying findings and opinion (J.A. 113-123), SEC interpreted the Holding Company Act as excluding from SEC's consideration, under the Holding Company Act, issues such as wasteful and unnecessary duplication of facilities; SEC held that, despite the broad language of the Holding Company Act concerning public interest and the interest of investors or consumers, these are matters to be considered exclusively by the Alabama Public Service Commission. In so holding, SEC did not make any determination—or indeed, any inquiry—as to the adequacy or effectiveness of the Alabama state regulatory measures. Instead, SEC said that "The Cooperative has misconceived our authority under the Act" (J.A. 116). Apparently the SEC decided that under the Act its jurisdiction was strictly limited "to the type, amount, price and other terms of the securities" (J.A. 116), and that it was totally foreclosed from considering broader issues relating to the public interest and the interest of investors or consumers.

The Cooperative filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit. On November 24, 1965, the Court of Appeals affirmed (R. 129-135). It thought that there is a "fallacy" in equating the Holding Company Act's term "public interest" with the same term "as it is used in licensing or certification statutes" (pp. 3a-4a, infra). Accordingly, it held that the Holding Company Act "has the restricted meaning attributed to it by the SEC" (p. 5a, infra) and that "the SEC acted properly and with commendable restraint in refusing to exercise the enlarged jurisdiction which the Cooperative urged upon it" (p. 5a, infra).

STATUTORY PROVISIONS INVOLVED

The statutory provisions which are involved, being lengthy, are set forth in Appendix B (pp. 6a-15a, infra). They are Sections 1, 6 and 10 of the Holding Company Act, and Section 10(e) of the Administrative Procedure Act.

REASONS FOR GRANTING THE WRIT

Although the question involved in this case is a question of first impression,[4] it is of substantial importance to the fair and effective administration of the Holding Company Act and it warrants review by this Court.

1. The SEC and the Court of Appeals have failed to adhere to the plain intent of a number of decisions of this Court—decisions wherein this Court has broadly interpreted terms such as "public interest" and "public convenience and necessity" in a wide variety of federal regulatory legislation. See, for example, *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U.S. 378, 391; *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 216-224; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 79-88; *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154; *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241; *Amer-*

[4] A comparable question now is awaiting oral argument (scheduled for March 28, 1966) in the United States Court of Appeals for the Fifth Circuit in No. 22858, *Alabama Electric Cooperative, Inc.* v. *Securities and Exchange Commission.* That case involves a subsequent financing application which Alabama Power Company filed with SEC; the Cooperative again sought to intervene on comparable grounds; on July 29, 1965, the SEC issued an order (Holding Company Act Release No. 15287) denying intervention and denying a hearing, essentially on the authority of its prior decision in the present case; and the Cooperative filed a petition for review in the Fifth Circuit.

ican Airlines v. *North American Airlines,* 351 U.S. 79, 82-86; *F.P.C.* v. *Transcontinental Gas Corp.,* 365 U.S. 1, 7-8; cf. *United Gas Co.* v. *Callery Properties,* 382 U.S. 223, 226. As this Court emphasized in two of the opinions just cited (360 U.S. at 391, and 365 U.S. at 8) —both of which happened to involve Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e)—such a statute "requires the Commission to evaluate *all* factors bearing on the public interest".

Here, however, the Court of Appeals (pp. 3a-4a, infra) has rejected the applicability of this whole line of cases on the ground that there is a "fallacy" in equating the Holding Company Act's term "public interest" with the same term "as it is used in licensing or certification statutes". On this ground the Court of Appeals justified the SEC's refusing even to consider whether Alabama Power Company's proposed use of the financing proceeds for wasteful and unnecessary duplication of existing facilities of REA-financed cooperatives would adversely affect what the Holding Company Act repeatedly refers to as "the public interest", "the protection of investors or consumers", and "the interest of investors or consumers".[5]

It is true that the cases previously adjudicated by this Court have, primarily, involved licensing or certification proceedings. But nothing will be found in the opinions to suggest that this Court intended any

[5] Among other places where they appear, the terms "public interest" and "the interest of investors or consumers" (or, alternatively to the latter, "the protection of investors or consumers") are the key terms in Section 1 (Findings and Declaration of Policy) as well as in Section 6(b) and in Section 10. These sections, which are the provisions of the Act directly involved in this case, are set forth in Appendix B (pp. 6a-14a, infra).

such restrictive interpretation to be imposed on the principles it enunciated. The whole thrust of this Court's rulings is in the direction of assuring that federal regulatory agencies, before making up their minds, will carefully consider all factors bearing on the public interest. Just as the "end use" to be made of the natural gas was held properly within the scope of the Power Commission's inquiry in *F.P.C.* v. *Transcontinental Gas Corp.*, supra, 365 U.S. at 8-22, so here the end use to be made of these financing proceeds is something which SEC cannot properly refuse even to consider.

Here the SEC and the Court of Appeals have drastically narrowed the scope of the inquiry. In doing this, they have seriously departed from the guidelines which this Court has so carefully established.

2. The Court of Appeals (p. 4a, infra) purported to find some support for its result in the legislative history of the Holding Company Act. The support was wholly misplaced. At most it shows what is undeniable —that in enacting the great reform measure known as the Public Utility Holding Company Act of 1935, the Congress intended and expected the Act to bring about reforms which would enable state regulatory processes to be strengthened. Nothing in the legislative history justifies jumping from that obvious truth to the unwarranted conclusion that "public interest" or "the protection of investors or consumers" were intended to be restricted so as to exclude totally from SEC's consideration a broad range of factors merely because they were factors which the state commissions were likely to consider. Indeed, Congress plainly did not direct or authorize that the SEC delegate entirely to state commissions the responsibilities lodged in SEC for

seeing that the additional federal protections, imposed by Holding Company Act standards, are assured to the public interest and to the interest of investors and consumers.

We recognize that not every misreading of legislative history is something which this Court feels called upon to correct. But here the misreading goes to a fundamental matter, and the occasion for review by this Court is particularly timely since it is evident that the Court will be extensively reviewing the legislative history of the Holding Company Act in No. 636, *Securities and Exchange Commission* v. *New England Electric System,* certiorari granted, 382 U.S. 953, which is expected to be argued later this term. This will make it especially timely and appropriate for the Court also to consider the impact of the Act's legislative history on the question presented here.

3. The decision below is not only erroneous, but is seriously detrimental to effective federal regulation of public utility activities which Congress clearly placed within the ambit of federal regulation. What SEC has done, in substance, is to abdicate totally to the state public service commissions an important segment of the responsibility which the Congress vested in SEC; and it has done this without even making inquiry into the adequacy or the effectiveness of the Alabama state regulatory process. But Congress never intended to leave wholly to the whim of the state commissions whether the public interest would be protected at all.

It is well known that there still remains a serious gap between the reality of electric utility regulation throughout the country and the goal of effective regu-

lation.[6] At least as long as such a serious gap persists, it will continue to be important for SEC to fulfill its responsibility for enforcing those minimal federal standards of public interest that the Holding Company Act imposes. Congress intended these substantial federal protections to remain available and effective, under the auspices of the federal SEC, no matter what the gaps and the weaknesses of state law and of state regulatory processes might turn out to be.

4. We emphasize that this case does not present a situation where SEC accorded a hearing to the Cooperative and considered on the merits all the factors which the Cooperative sought to adduce, and then reached a conclusion that, on the merits, "the public interest" and "the protection of investors or consum-

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[6] See, for example, the following excerpts from an address by Joseph C. Swidler, Chairman, Federal Power Commission, "A Program for State-Federal Cooperation in Electric Utility Regulation", before the National Association of Railroad and Utilities Commissioners Convention, New York, New York, October 2, 1965, pp. 14-16:

> "As we all know, state legislatures have not been uniformly willing to grant broad jurisdiction. Surveys made by this Association show that three of our states have not yet empowered a state-wide commission to regulate electric rates (Texas, Minnesota, South Dakota). Other states have failed to authorize regulation of wholesale rates, or have otherwise restricted the scope of regulation. Even more important, however, is the fact that in many states which have model laws the legislatures have withheld the practical resources for their effective administration. . . .
>
> "What is clear from these statistics and confirmed by our own knowledge is that there is a serious gap between the reality of electric utility regulation throughout the country and the goal which we in NARUC share, a goal of effective regulation, fairly administered by strong and independent commissions."

ers" did not require that SEC impose conditions of the type which the Cooperative requested. This is the very opposite of what occurred. What the Cooperative is challenging is not an assessment which SEC actually made of all the competing factors—for this is something SEC never did—but rather SEC's interpretation of the Act as barring SEC from taking into account at all the factors which the Cooperative put forward as bearing on the public interest and the protection of investors or consumers.

Such a narrowing of the basic concept simply cannot be squared with the Act. Surely it cannot be totally irrelevant to the national public interest, which the Holding Company Act directs SEC to protect, that a financing plan proposed by the subsidiary of a large interstate registered holding company is to be used to accomplish wasteful, unnecessary and unjustified duplication of existing facilities. This is particularly the case if such duplication is aimed at crippling or impeding the operations of existing REA-financed cooperatives which are carrying out important federal programs Congress has authorized in the Rural Electrification Act, 7 U.S.C. §§ 901 et seq., and in subsequent annual appropriation laws. And equally, it cannot be totally irrelevant to the national public interest, and to the interest and protection of consumers, that the proceeds of such a financing plan are to be used to construct wasteful, unnecessary and unjustified duplicating facilities which will become a permanent component to enlarge Alabama Power Company's rate base and hence militate against rate reductions by Alabama Power Company, and which will wastefully idle cooperatives' ex-

isting facilities and hence militate against rate reductions by cooperatives.

Nothing in the legislative history warrants reading the Act in so destructively narrow a manner as to justify totally excluding such factors from SEC's consideration. Certainly the text of the Act itself provides no basis for doing so.

CONCLUSION

On the important matter raised by this case, the SEC has espoused a self-denying and highly restrictive interpretation of the Holding Company Act. This restrictive interpretation has been affirmed by the Court of Appeals on grounds which, like the SEC's, depart from the plain intent of numerous decisions of this Court placing a much broader interpretation on terms such as "public interest" used in a wide variety of federal regulatory legislation. By unduly curtailing SEC's jurisdiction, the decision upsets the allocation of responsibilities which Congress contemplated as between the federal government and the states. And the Court of Appeals has reached its result by an erroneous reading of the Holding Company Act's legislative history—a legislative history which this Court will shortly be examining in connection with No. 636, *Securities and Exchange Commission v. New England Electric System,* now awaiting oral argument.

For the reasons which have been stated, the petition for certiorari should be granted.

Respectfully submitted,

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